

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1190

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 8, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 61929). The employer filed a timely request for hearing. On December 18, 2018, ALJ M. Davis conducted a hearing, and on December 20, 2018, issued Order No. 18-UI-121580, affirming the Department's decision. On December 27, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Lane Community College employed claimant as a public safety officer from January 2001 until October 8, 2018.

(2) The employer expected that employees would not sexually harass coworkers. The employer's written policy defined sexual harassment as unwanted sexual advances, requests for sexual favors and/or other conduct that makes the terms or conditions of employment contingent on the acceptance of unwanted sexual advances that negatively affects employment or educational opportunities or creates an intimidating, hostile or offensive environment for one of the parties. Exhibit 1 at 20. Although claimant did not know the exact wording of the employer's policy, he understood that the employer generally prohibited sexual harassment.

(3) For a period lasting approximately six months in 2015, claimant exchanged text messages and Facebook messenger messages with a female coworker. The coworker was over age 18. Some of claimant's messages were sexually explicit. Claimant did not message the coworker while they were at work. Claimant did not supervise the coworker and did not make the coworker's employment contingent on the coworker's participation in exchanging the messages. The coworker responded to some of claimant's messages with sexually explicit messages of her own.

(4) Beginning in approximately late 2017, claimant exchanged text messages and Facebook messenger messages with two other female coworkers. Some of claimant's messages were sexually suggestive and some were sexually explicit. Both coworkers were over 18, and one of them was a student. Claimant did

not message the coworkers while they were at work. Claimant did not supervise the coworkers and did not make the coworkers' employment contingent on the coworkers' participation in exchanging the messages with him. One of the coworkers responded to some of claimant's messages with sexually explicit responses of her own. When the other coworker told claimant she did not want to exchange text messages with him because she was romantically involved with another coworker, claimant stopped sending messages to her.

(5) On May 10, 2018, one of the coworkers with whom claimant was exchanging messages with sexual content told an employer representative as part of a background investigation that she did not want claimant to be assigned as her field training officer because she had been exchanging messages containing sexual content with him. That day, the employer placed claimant on paid administrative leave pending an employer investigation. During the investigation, the employer learned of the two other coworkers with whom claimant had exchanged sexually suggestive and explicit messages.

(6) On October 8, 2018, the employer discharged claimant for violating its sexual harassment policy by sending the messages he sent to the three female coworkers beginning in 2015.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, no witnesses testified on the employer's behalf and the only evidence the employer presented was Exhibit 1, which contained a copy of the employer's sexual harassment policy and letters summarizing the results of the employer's investigation. To the extent that claimant's testimony about the alleged sexual harassment conflicted with the hearsay facts set out in the letters, claimant's first-hand evidence is entitled to greater weight than that hearsay. In the event of such conflict, we have accepted claimant's testimony as accurate and have found facts accordingly.

From the facts as testified to by claimant, the sexually-based messages he sent to the female coworkers were not unwelcome, but were generally responded to by the coworkers in-kind. In the one instance where the coworker asked claimant to stop sending messages because she was involved with someone else, he promptly did so. Claimant did not supervise any of the three coworkers during and after he sent the sexually-themed messages to them and claimant did not make aspects of the coworkers' employment contingent on participating in the exchange of messages. The evidence in the record was insufficient to show that any of the female coworkers experienced claimant's messages as intimidating, hostile or offensive. Given these facts, the employer did not demonstrate that claimant violated its policy prohibiting sexual harassment as written or as reasonably understood.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-121580 is affirmed.

D. P. Hettle and S. Alba;
J. S. Cromwell, not participating.

DATE of Service: January 29, 2019

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية محكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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